S. 2030, 79th Cong., 2d Sess., p. 19) should teach the courts to give considerable weight to the administrative construction of the law. But that is not to say, as the Court does, that it is so much a matter of administrative discretion as to preclude judicial review.[1] To my mind *McGrath v. Kristensen*, 340 U. S. 162, is squarely in point. There there was a statute which bristled with discretion as much as this one. But where the administrative decision under it was not rendered on the basis for the exercise of discretion the statute provided, but as a matter of law, judicial review was available. We retreat from established principles of administrative law when we say it is unavailable here. The judgment of the Court of Appeals should be reversed, and the order of the District Court declining to dismiss the complaint for want of jurisdiction should be affirmed.

[1] One of the grounds on which the administrative officials may decline return under § 32 (a) is that the claimant was not the owner of the property at the time it was vested, or the successor thereof. § 32 (a) (1). Is this simply to be deemed a guide to the administrative discretion in granting returns, or a legal standard?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 320

DALTON HOWARD, *Petitioner*,

v.

STATE OF LOUISIANA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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STATE OF LOUISIANA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana, entered March 23, 1959, affirming petitioner's conviction, in the Fifteenth Judicial District Court, Parish of Lafayette, Louisiana, for the crime of public bribery, upon which he was sentenced to serve four years in the State Penitentiary.

OPINION BELOW

The opinion of the Supreme Court of Louisiana has not yet been reported. Certified copy is filed herein with the Record; the pertinent portion is reproduced in the Appendix hereto (App. 1a).

JURISDICTION

The judgment of the Louisiana Supreme Court was entered March 23, 1959 (App. 1a); an order denying rehearing was filed June 1, 1959 (App. 26a). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. sec. 1257(3), 62 Stat. 929.

QUESTION PRESENTED

In a state criminal case, does the court's appointment of counsel for indigent defendant a month after arraignment, and only "a few minutes" before trial begins, (thus barring a plea of former acquittal, and affording no opportunity to call available witnesses) meet the due process requirements of the Fourteenth Amendment as set forth by this Court in *Powell v. Alabama*, 287 U.S. 45 (1932)?

STATUTES INVOLVED

The provisions of the Louisiana Constitution and Revised Statutes pertinent to the discussion are reproduced in the Appendix hereto, page 29a and 30a.

STATEMENT

Petitioner, Dalton Howard, has been tried twice for the same acts. With his own counsel he was acquitted; later he was convicted on the same evidence, without "effective assistance of counsel," but with a young, and inexperienced attorney appointed by the court "a few minutes" before the trial began.

11 April, 1957, Howard, a 27 year old negro, had been for nine months a police patrolman of the City of Lafayette, Louisiana. At the request of his immediate superior, Paul Lewis, he borrowed his brother-in-law's truck for Lewis to use in farm hauling. When

returned, the truck motor had been burned out, needed repairs costing $120. Lewis paid this amount to Howard (App. 19a), who delivered it to Felton Arceneaux, his brother-in-law who owned the truck (App. 25a).

Howard was indicted for complicity in a burglary perpetrated by Lewis and others (App. 12a); the borrowed truck had been used to transport a stolen safe. Aided by experienced counsel, Howard was tried and found by a jury to be not guilty (App. 16a-18a).

Then the same District Attorney who had prosecuted the first case charged Howard by information with accepting a bribe (App. 12a-13a, 16a-18a), viewing the $120 he had received, not as fruit of the burglary, but as inducement to conceal the crime, in violation of his duty as a police officer.

Suspended from the police force, still in debt to counsel for his first trial, petitioner was without funds to pay another lawyer[1] (App. 24a). Arraigned for the bribery without counsel, he pleaded not guilty, and elected to be tried by jury (R. 1).

A month later, 7 May 1958, the same judge who had tried the first case appointed a young, inexperienced attorney, Mr. Harold Savoie, to defend (R. 2), and began the trial "within a few minutes thereafter." (App. 13a-14a). Mr. Savoie had been practicing law three years, had never alone conducted a jury trial. He told the court he "did not care to" defend Howard, but if appointed, he "had no choice." (App. 13a-15a). He did not learn of any defense witnesses (App. 15a),

[1] Counsel here are serving without compensation; Louisiana counsel paid the expenses of this petition.

though several were offered on the first trial and were still available. (App. 15a; 9a, par. q,—10a; 25a).[2]

The court refused to admit in evidence the record of the first trial (App. 28a). While it was too late to plead the former acquittal,[3] exclusion of the prior record was clearly a ruling on that point:

> "The court is of the opinion that one can be charged with several charges out of the crime. An acquittal on another crime is irrelevant." (App. 29a).

From 1:30 to 5:45 P.M. of 7 May, 1958, and 9:00 to 10:45 A.M. of 8 May, the testimony was taken. In 25 minutes the jury returned a verdict of guilty. (App. 17a). Four years in the State Penitentiary was the sentence (App. 1a).

The Louisiana Supreme Court affirmed the judgment, held the late assignment of counsel not a violation of federal constitutional rights (App. 3a-4a). Motion for rehearing, praying also an opportunity to prove the facts making double jeopardy (App. 10a-11a), was denied 1 June 1959 (App. 26a).

Meantime there is still pending a charge of Receiving Stolen Things brought by the same District Attorney and based on the same transaction (App. 24a). Louisiana Counsel for petitioner has removed this to the United States District Court on a claim of federal rights.

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[2] The affidavit of petitioner Howard, filed below in support of Motion for Rehearing (App. 19a-24a) lists by name two defense witnesses who testified on the first trial: Ivy Smith (App. 21a), and Hammond Mitchell (App. 22a). Similar affidavit of his brother-in-law, Felton Arceneaux, was filed below (App. 25a).

[3] La. Rev. Stat., 1950, title 15, sec. 281 (App. 30a), requires that such a plea be urged, tried and disposed of before trial.

REASONS FOR GRANTING THE WRIT

Powell v. Alabama, 287 U. S. 45 (1932), was held to be inapplicable below. Recognizing that this Court's interpretation of the right to counsel includes a reasonable time for preparation, the Louisiana Court held (App. 3a):

> "* * * there should be a showing that such time was needed, requested, and denied.
>
> "Counsel appointed by the Court in the instant case did not request a continuance for time to prepare the accused's defense."

In this the Louisiana Court follows the dissenting opinion of Mr. Justice Butler in the *Powell Case* (287 U. S. at page 76), which the Court majority rejected; it conflicts directly with this Court's decision (287 U. S. at page 52):

> * * * it is the *duty of the court*, whether requested or not, *to assign counsel* for him *as a necessary requisite of due process of law*; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of *effective aid in the preparation and trial of the case.*" (italics supplied).

This Court has more recently held that "fair conduct of a trial depends largely on the wisdom and understanding of the trial judge." His is the "primary responsibility." *Gibbs* v. *Burke*, 337 U. S. 773, 781 (1949). But here the Louisiana Court has shifted responsibility from the dominant shoulders of the judge to those of counsel; in so doing it has eviscerated the constitutional protection established by this Court.

Petitioner Howard was arraigned 8 April 1958, without counsel, as the Louisiana Court noted (App.

2a). Under applicable State statutes, his plea of not guilty barred the right to demur, move to quash the indictment, object to composition of grand jury.[4]

For a month after arraignment petitioner remained without counsel, until "a few minutes" before the trial began (App. 14a). This is exactly the procedure expressly condemned in the *Powell Case* (287 U. S. at page 56):

> It thus will be seen that *until the very morning of the trial* no lawyer had been named or definitely designated to represent the defendants. * * *
>
> (p. 57) * * * during perhaps the most critical period of the proceedings against these defendants, that is to say, *from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself* (italics supplied).

This petitioner was in identical circumstances. His counsel knew nothing of the case, and had no time to prepare (App. 13a-15a). The State Court's denial of constitutional protection ignores the applicable standard of the *Powell Case* (278 U. S. at page 58):

> It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. *Neither they nor the Court could say what a prompt and thorough-going investigation might disclose as to*

[4] La. Rev. Stat. 1950, title 15, sec. 284 (App. 30a). The trial judge allowed the accused until April 28, 1958, "to file any pleadings." During this entire period he was without counsel (App. 2a).

> *the facts.* No opportunity to do so was given. Defendants were immediately hurried to trial. * * * Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense (italics supplied).

Quoting with approval from *Commonwealth* v. *O'Keefe*, 298 Pa. 169, 173, 148 Atl. 73, 74, this Court said (287 U. S. at page 59):

> It is vain to give the accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or the law of the case.

Clearly the right to counsel is not limited to trial on the merits. *Crooker* v. *California*, 357 U. S. 433, 439 (1958); *Moore* v. *Michigan*, 355 U. S. 155, 160 (1957); *Reece* v. *Georgia*, 350 U. S. 85, 89-90 (1955); *Chandler* v. *Fretag*, 348 U. S. 3, 10 (1954); *Gibbs* v. *Burke*, 337 U. S. 773, 781 (1949); *Uveges* v. *Pennsylvania*, 335 U. S. 437, 442 (1948); *Townsend* v. *Burke*, 334 U. S. 736, 741 (1948); *House* v. *Mayo*, 324 U. S. 42, 46 (1945); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940).

The State Court indicates a view that *Powell* v. *Alabama* applies only in capital cases (App. 4a). This fails to square with a contrary holding in *Wade* v. *Mayo*, 334 U. S. 672, 684 (1948), and other cases cited above, where non-capital cases have been given this Court's constitutional protection. *Gibbs* v. *Burke*, 337 U.S. 773 (1949); *Cash* v. *Culver*, 358 U. S. 633, 638 (1959).

Betts v. *Brady*, 316 U. S. 455 (1942) is cited by the Louisiana Court as support for the decision (App. 4a). Actually this is a misconstruction of that case,

where it was clearly recognized (at page 473) that "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right." At the last term, this Court decided *Cash* v. *Culver*, 358 U.S. 633 (1959), holding that counsel must be available wherever the circumstances are such that criminal proceedings would otherwise be "so apt to result in injustice as to be fundamentally unfair." The same rule was stated and applied in *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441 (1948). Likewise this Court has cloaked with the protection of due process an uncounseled defendant sentenced on an erroneous record. *Townsend* v. *Burke*, 334 U. S. 736, 741-742 (1948). Applying this standard in *Gibbs* v. *Burke*, 337 U. S. 773 (1949), the Court said (page 781) "This case is of the type referred to in *Betts* v. *Brady*, *supra*, 316 U. S. at page 473, as lacking fundamental fairness because neither counsel nor adequate judicial guidance or protection was furnished at the trial."

Petitioner Howard was seriously prejudiced by lack of counsel in two important respects: (1) the former jeopardy objection was not raised in advance of trial, as required by State law, and (2) not a single witness was called for the defense, though several had testified on the first trial and were still available (p. 3, *supra*).

Petitioner is a young negro, 27 years old at the time of the alleged offense. He can read and write but has only a grade school education. He had always worked as a laborer before his employment as a patrolman on the police force. Plainly he was very much in need of counsel to meet the charge of public bribery.

The language of *Powell* v. *Alabama* has been widely quoted (287 U. S. at page 69):

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise irrelevant. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Petitioner was incapable himself of raising the double jeopardy question, though the prior acquittal was a matter of record before the same judge and the same prosecutor. The organic law of the State[5] prohibits double jeopardy; the same language is codified in the statutes.[6] Long ago, in 1805, the provision of the United States Constitution in the Fifth Amendment against double jeopardy had been expressly adopted by Louisiana statute. *State* v. *Chevers*, 7 La. Ann. 40 (1852). Since the conviction below was obtained with the same witnesses, the same evidence as that used in the first trial, where petitioner was acquitted, another trial would seem to be clearly banned by the rule of *State* v. *Yokum* (on rehearing), 155 La. 846, 99 So. 621 (1924). Complexity of the subject may be gathered from the

[5] La. Const. 1921, Art. 1, sec. 9 (App. 29a).

[6] La. Rev. Stat., 1950, Title 15, sec. 274 (App. 30a).

learned discussion of Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319 (1937). There this Court upheld the state law permitting appeal by the state in criminal cases; the opinion notes, however, (page 328):

> "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider. * * * The state is not attempting to wear the accused out by a multitude of cases with accumulated trials."

The point was urged in the State Supreme Court by the Motion for Rehearing (App. 5a, 10a), and remand of the case prayed in order that the facts be developed (App. 11a). This was denied (App. 26a) without opinion.

Beyond question, Mr. Harold Savoie, as counsel appointed "a few minutes" before the trial, did everything he could under the circumstances, devotedly and ably. His youth and limited experience show only that his need for time to prepare the case, by the standard of *Powell* v. *Alabama*, was greater than a more seasoned lawyer would require. The accused obviously didn't tell him of defense witnesses on the prior trial (App. 15a).

It may be noted that Louisiana statute gives the right to appointed counsel in felony cases.[7] This is not stressed here, because the constitutional right to counsel, where it exists, stems directly from the Fourteenth Amendment and not from state law. *Wade* v. *Mayo*, 334 U. S. 672, at 683 (1948).

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[7] La. Rev. Stat., 1950, title 15, sec. 143 (App. 30a).

To borrow the very apt reasoning of Mr. Justice Brennan in *Cash* v. *Culver*, *supra* (358 U.S. 633, at page 638, note 7):

> "The very fact that the jury failed to convict at the first trial, when the petitioner was represented by counsel, is at least some practical indication of the difference a (well-prepared) lawyer's help at the second trial might have made" (parentheses inserted).

CONCLUSION

It is respectfully submitted that certiorari should issue to clarify the improper limitation placed upon *Powell* v. *Alabama* by the Louisiana Supreme Court, to the prejudice of petitioner (1) in preventing a plea of double jeopardy, and (2) in going to trial without witnesses in his defense, due to appointment of counsel "a few minutes" before the trial began.

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Certificate of Service

I hereby certify that copies of this Petition for Certiorari have been served upon counsel for respondent, Bertrand DeBlanc, District Attorney, Lafayette, Louisiana, and upon the Attorney General of the State of Louisiana, Hon. Jack P. F. Gremillion, State Capitol Building, Baton Rouge, Louisiana, by United States Mail, airmail postage prepaid, on August , 1959.

RUSSELL MORTON BROWN